

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC JOSEPH MARTIN,

Defendant-Appellant.

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UNPUBLISHED

June 14, 2005

No. 255869

Baraga Circuit Court

LC No. 03-821-FH

Before: Owens, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Defendant appeals as of right his conviction following a jury trial of perjury in a court proceeding, MCL 750.422. He was sentenced to twenty-nine months' to fifteen years' imprisonment. This case arose when, in connection with his motion to disqualify Baraga Circuit Judge Garfield W. Hood in underlying proceedings, defendant stated under oath that he saw Judge Hood sitting in the deputy warden's office eating donuts and drinking coffee with the deputy warden and the two guards who were complainants in the underlying proceedings. We affirm.

Defendant first argues that his right to equal protection was violated when he was selectively prosecuted for perjury when other witnesses who lie under oath have not been. We disagree.

A prosecutor's decision with respect to his duties may only be reviewed by the courts to determine whether it was "unconstitutional, illegal, or ultra vires." *People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996), quoting *People v Morrow*, 214 Mich App 158, 161; 542 NW2d 324 (1995). A claim of violation of equal protection is reviewed de novo. *In re Hawley*, 238 Mich App 509, 511; 606 NW2d 50 (1999). Whether a prosecutor's decision violates the Equal Protection Clause is determined by a two-pronged test:

"First, it must be shown that the defendants were 'singled' out for prosecution while others similarly situated were not prosecuted for the same conduct. Second, it must be established that this discriminatory selection in prosecution was based on an impermissible ground such as race, sex, religion or the exercise of a fundamental right." [*In re Hawley, supra* at 513, quoting *People v Ford*, 417 Mich 66, 102; 331 NW2d 878 (1982).]

To support his claim that he was singled out, defendant argues that Michigan has long recognized that witnesses lie while testifying under oath, and only twenty-four out of more than 8,300 Michigan appellate cases decided since 1992 involved charges of perjury. However, defendant's statistics do not demonstrate that he was singled out for prosecution. See, for example, *People v Conat*, 238 Mich App 134, 156; 605 NW2d 49 (1999) (defendants were required to demonstrate that "the prosecutor, on the basis of impermissible factors, decided to charge as adults certain individuals who committed certain crimes and to charge as juveniles other juveniles who committed the same crimes"). Defendant's statistics here do not indicate how many individuals willfully gave false testimony in a court proceeding, but who were not prosecuted. "[T]he mere fact that some persons are charged differently from others for the same conduct does not violate equal protection." *Id.* at 156-157, citing *People v Maxson*, 181 Mich App 133, 134-135; 449 NW2d 422 (1989). Moreover, defendant's assertion – that the directly contradictory testimony of two witnesses clearly indicates that one of the witnesses is lying – ignores the fact that the court generally is not clearly aware which witness is lying, while in the instant case, the judge knew for certain that defendant was lying because defendant was lying about the judge's actions.

Furthermore, defendant is unable to meet the second part of the test. Prisoners are not in a suspect classification. *People v Sleet*, 193 Mich App 604, 606; 484 NW2d 757 (1992). And lying in court constitutes a felony offense, MCL 750.422, not the exercise of a fundamental right. With respect to defendant's argument that he was prosecuted because the judge harbored personal animus toward him, defendant claims the judge became personally upset by defendant's coffee and donut allegation. However, the testimony indicates that the judge suggested a perjury investigation on proper grounds rather than any personal animus.

Nevertheless, defendant argues that the fact the court did not suggest a perjury investigation with respect to the other allegations in defendant's affidavit indicated that the judge was personally offended by the coffee and donut allegation. Upon reviewing the record, we find that the factual bases of the remaining allegations were either true, or the allegations were abandoned at the hearing. Hence, the only remaining allegation that was not either true or abandoned was the coffee and donuts allegation. The judge was permitted to question defendant about the undeveloped allegation. *People v Davis*, 216 Mich App 47, 49-51; 549 NW2d 1 (1996), citing *People v Conyers*, 194 Mich App 395, 404-405; 487 NW2d 787 (1992) (the court may question witnesses to clarify testimony or obtain additional relevant information).<sup>1</sup>

Defendant next argues that the prosecutor presented insufficient evidence to convict him of perjury because the prosecutor failed to demonstrate that the coffee and donuts allegation was material to the judge's decision whether to disqualify himself. We disagree.

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<sup>1</sup> Defendant argues that the judge demonstrated bias when he induced defendant to make the statement on the stand under oath. Defendant acknowledges that an affidavit is a sworn statement but claims the subject affidavit was defective because it was likely unsworn. Although there was some indication that a case involving another prisoner was dismissed because of an unsworn affidavit, defendant has not cited anyplace in the instant record where defendant raised this issue. Therefore, this argument has been abandoned.

A claim of insufficient evidence is reviewed de novo in a light most favorable to the prosecutor to determine whether enough evidence was presented for a rational jury to have found defendant guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Whether a judicial decision should be applied retroactively is also reviewed de novo. *Lincoln v Gen Motors Corp*, 461 Mich 483, 490; 607 NW2d 73 (2000). After defendant was convicted, our Supreme Court determined that materiality was not an element of perjury. *People v Lively*, 470 Mich 248, 249, 254; 680 NW2d 878 (2004). Whether a judicial decision is given retroactive effect is determined by the three-part test announced in *People v Hampton*, 384 Mich 669, 674; 187 NW2d 404 (1971). Courts must consider “(1) the purpose of the new rule; (2) the general reliance on the old rule; and (3) the effect on the administration of justice.” *Id.*, citing *Linkletter v Walker*, 381 US 618; 85 S Ct 1731; 14 L Ed 2d 601 (1965).<sup>2</sup>

In *Lively*, *supra* at 256, the stated purpose for the new rule was to effectuate the Legislature’s intent that materiality not be an element of perjury. Because the new rule affected the elements a prosecutor was required to prove to convict a defendant of perjury, the new rule was relevant to the ascertainment of guilt or innocence. “‘When a decision of [the Michigan Supreme Court] involves a rule which concerns the ascertainment of guilt or innocence, retroactive application may be appropriate.’” *People v Sexton*, 458 Mich 43, 63; 580 NW2d 404 (1998), quoting *People v Young*, 410 Mich 363, 367; 301 NW2d 803 (1981), citing *Hampton*, *supra*.

The second and third parts of the retroactivity test are often considered together because the amount of past reliance usually affects the administration of justice. *Sexton*, *supra* at 63, citing *Young*, *supra* at 367. Generally, unless a judicial decision is completely unexpected or indefensible, it is given complete retroactive effect. *Sexton*, *supra* at 63-64, citing *People v Doyle*, 451 Mich 93, 104; 545 NW2d 627 (1996). When a statutory provision is unambiguous, and a judicial decision is contrary to the clear statutory language, a subsequent decision that overrules the contrary decision cannot be considered unexpected or indefensible. *People v Meshell*, \_\_\_ Mich App \_\_\_, \_\_\_; \_\_\_ NW2d \_\_\_ (2005), slip op at 13, lv pending. The Court in *Lively*, *supra* at 255 n 7, noted that Michigan courts have assumed for more than 150 years that materiality was an element of perjury. This would appear to preponderate toward prospective application of the *Lively* decision.

Nonetheless, we find that the statement was material. A statement is material if it could have affected the outcome of the proceeding. *People v Kozyra*, 219 Mich App 422, 432; 556 NW2d 512 (1996). In a judicial disqualification proceeding, a judge must be disqualified when “[t]he judge is personally biased or prejudiced for or against a party or attorney.” MCR 2.003(B)(1). The personal bias must be actual and stem from an extrajudicial source. *Cain v Dep’t of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996). From the allegation in defendant’s affidavit, a reasonable inference could be drawn that the judge engaged in ex parte

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<sup>2</sup> In *Harper v Virginia Dep’t of Taxation*, 509 US 86, 95; 113 S Ct 2510; 125 L Ed 2d 74 (1993), the United States Supreme Court noted that it overruled *Linkletter*, *supra*, in *Griffith v Kentucky*, 479 US 314; 107 S Ct 708; 93 L Ed 2d 649 (1987), by holding that all new rules applied retroactively to any criminal case pending on direct review.

communications with the victims. Code of Judicial Conduct, Canon 3A(4) provides that a judge shall not engage in ex parte communications subject to several exceptions that do not apply to defendant's allegation.

Recently, even though she did not consider herself prejudiced or biased by the communication, Justice Weaver disqualified herself from a case pursuant to MCR 2.003(D) and Code of Judicial Conduct, Canons 3C and D, when the Chief Justice suggested that her communication with the state Family Independence Agency office could be considered an ex parte communication contrary to Code of Judicial Conduct, Canon 3. *In re JK*, 468 Mich 202, 222-223, 225; 661 NW2d 216 (2003). Canon 3C provides, "A judge should raise the issue of disqualification whenever the judge has cause to believe that grounds for disqualification may exist under MCR 2.003(B)." And in *In re Templin*, 432 Mich 1220, 1221; 436 NW2d 663 (1989), the Supreme Court sanctioned a judge pursuant to Code of Judicial Conduct, Canons 3A, 3C, and 2A, for dating a defendant while the case was pending before him and not raising the disqualification issue sua sponte.

Thus, defendant's allegation, if true, could have required the judge to raise the ex parte communication issue before the parties and, unless the parties agreed, to disqualify himself pursuant to MCR 2.003(D). Given the fact that defendant sought the judge's disqualification, it is unlikely that defendant would have agreed that the judge should not have been disqualified. Thus, the allegations, if true, could have affected the outcome of the proceeding and were material. *Kozyra, supra* at 432.

Defendant next argues that he was denied a fair trial when he was shackled and gagged. We disagree.

A trial court is given broad discretion to control court proceedings. *People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002). This discretion includes the ability to shackle a defendant. *Id.*, citing *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). However, a defendant may only be shackled if the record supports a finding that "shackling is necessary to prevent escape, injury to persons in the courtroom, or to maintain order." *People v Dunn*, 446 Mich 409, 411, 425; 521 NW2d 255 (1994). In the instant case, the prison's records custodian testified that defendant was originally imprisoned in 1994 for larceny from a motor vehicle. In 1995, defendant was convicted of carrying a concealed weapon while in prison. During defendant's ten-year incarceration, he was cited for 246 misconducts of which forty-six involved threatening behavior, twenty-six involved assaults on personnel, and "several" involved possession of homemade prison weapons.

Defendant had been in segregation since August 1996, because he was considered a danger to himself and the prison population, and he had been on trial for throwing feces at two guards when the instant perjury offense occurred. The court noted defendant's record, as well as the demonstrated disrespect when defendant refused to stand at the beginning of the proceedings, and ordered defendant shackled. A trial court's decision to shackle a defendant is amply supported by the record when a defendant has an extensive prison misconduct record demonstrating his lack of respect for authority, his inability to conform behavior to accepted norms, and his tendency toward violence. *Dixon, supra* at 405. Moreover, the court took care to limit any prejudice when it specifically instructed the jury not to draw any conclusions from the fact that defendant was shackled. Therefore, the court did not abuse its discretion.

With respect to the gagging, Michigan courts appear to have addressed this issue only once. *People v Kerridge*, 20 Mich App 184, 186-188; 173 NW2d 789 (1969). This Court found that although gagging should only be considered as a last resort, it was appropriate when the defendant repeatedly announced he was not going to stand trial; attempted to leave the courtroom when his case was called; undressed himself and remained nude in his cell following a court-ordered psychiatric examination; and used vile, disruptive, abusive, and profane language. *Id.* The United States Supreme Court has also addressed a trial court's discretion with respect to an obstreperous defendant. *Illinois v Allen*, 397 US 337, 343-344; 90 S Ct 1057; 25 L Ed 2d 353 (1970):

No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations. We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant . . . (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly.

Although the Court expressed dissatisfaction with the first method because it could affect the jury's feelings about defendant, it was an affront to the dignity of the proceedings, and it limited the defendant's ability to communicate with counsel, the Court noted, "in some situations which we need not attempt to foresee, binding and gagging might possibly be the fairest and most reasonable way to handle a defendant who acts as [this defendant] did here." *Id.* at 344. The Court noted that contempt was not likely to be effective when a defendant was determined to prevent a trial and ultimately faced a more serious consequence. *Id.* at 345. The Court specifically declined to hold that removing the defendant from his own trial was the only way the trial court could have solved the problem.

In the instant case, defendant interrupted the court thirty-five times during the court's initial instructions to the jury. The court had the jury removed, then admonished defendant and threatened to exclude him. This indicated that the court was aware of the option of excluding defendant from the proceedings. During the court's discussion with defendant and counsel, defendant made six more comments indicating his unwillingness to cooperate. During defense counsel's opening arguments, defendant interrupted another six times. When asked if he was able to continue, defense counsel responded, "You know, I'm in a delicate position there. It's my client, I want him in the courtroom, but he is . . .". This was some indication that defense counsel did not want defendant excluded from the courtroom. The court dismissed the jury a second time and informed defendant that he would be gagged if he did not cooperate. To which defendant replied, "Power of the stone." *Id.* Defendant aptly demonstrated his obstreperousness.

Given defendant's complete lack of cooperation, it was appropriate for the court to take some sort of action to maintain control of the proceedings. *Illinois, supra* at 343-344. Because defendant was already in prison and was facing another prison sentence, it is highly unlikely that holding defendant in contempt would have been effective. *Id.* at 345. When the jury was brought in, the court's comments to the jury indicated it considered gagging defendant to be less prejudicial than excluding defendant. Moreover, the court reaffirmed this when it addressed defendant's motion for a mistrial the following day.

To address the concerns raised by the United States Supreme Court with respect to gagging, defendant's ability to communicate with counsel was no less limited than if he had been

removed from the proceedings. Moreover, it is hard to imagine how seeing defendant gagged would be more of an affront to the court's dignity or affect the jury's feelings toward defendant more than defendant had already done with his forty-one comments in front of the jury, primarily about leprechauns turning everyone to stone. As noted in *People v Henley*, 382 Mich 143, 147; 169 NW2d 299 (1969), with respect to shackling a defendant, "The conduct of the defendant may well have prejudiced the jury but this defendant cannot complain inasmuch as he cannot claim the benefit of the error that he himself occasioned." Therefore, reversal is not required.

Affirmed.

/s/ Donald S. Owens  
/s/ Mark J. Cavanagh  
/s/ Janet T. Neff